JEAN E. WILLIAMS
Deputy Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Division

JOHN S. MOST, Trial Attorney
Natural Resources Section
P.O. Box 7611 Washington, D.C. 20044
202-616-3353 || 202-305-0506 (fax)
John.Most@usdoj.gov

Counsel for Federal Defendants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

WILDEARTH GUARDIANS and MONTANA ENVIRONMENTAL INFORMATION CENTER, Plaintiffs, v. DAVID BERNHARDT, Secretary of the Interior, *et al*. Federal Defendants, and SPRING CREEK COAL, LLC, Intervenor Defendants.	CV 17-80-SPW-TJC **FEDERAL DEFENDANTS' RESPONSE TO PLAINTIFFS' RULE 72 OBJECTIONS**

Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b)(2), the Secretary of the Department of the Interior and other named Federal Defendants hereby respond to Plaintiffs' Rule 72 objections, ECF No. 78, which are directed at two aspects of the February 11, 2019 Findings and Recommendations of the Magistrate Judge. ECF No. 71 (the "Report"). Specifically, Plaintiffs object to the Magistrate's finding: (1) that the Office of Surface Mining Reclamation and Enforcement ("OSMRE") did not improperly piecemeal its mining approvals to avoid preparing an environmental impact statement ("EIS"); and (2) that remand without vacatur for corrective environmental analysis under the National Environmental Policy Act ("NEPA") is an appropriate remedy, should the Court conclude the agency erred.

ARGUMENT

1. The Magistrate Correctly Found that OSMRE had not Improperly Piecemealed its Analysis.

The Court should adopt the Magistrate's finding that OSMRE has not improperly piecemealed or segmented its approvals at the Spring Creek Mine and thus did not shirk any duty to prepare an EIS. Plaintiffs note that an agency may not avoid preparation of an EIS by "breaking [an action] down into small component parts," ECF No. 38 at 16 (citing 40 C.F.R. § 1508.27(b)(7)), but as the Magistrate concluded, neither OSMRE nor the Spring Creek Mine did so here.

In their objections, ECF 78, Plaintiffs do not show otherwise and instead simply rehash their segmentation arguments from merits briefing, restating their reliance on *Cady v. Morton*, 527 F.2d 786 (9th Cir. 1975), and *Save our Sonoran, Inc. v. Flowers*, 408 F.3d 1113 (9th Cir. 2005). But as the magistrate observed, *Cady* is "readily distinguishable" because of its factual differences: the dispute involved Interior's approval of a 30,000-acre coal lease without any environmental analysis. ECF No. 71 at 32 (citing *Cady*, 527 F.2d at 789). *Save our Sonoran* is also distinguishable because the "gerrymander[ing]" of permit applications observed in that case bears no resemblance to the facts here. Noting that the Mineral Leasing Act "contemplates incremental expansion of coal mines by providing a lease modification process," the Magistrate correctly declined to label the various approvals at the mine over the decades as "gerrymandered," a term that Merriam-Webster defines as "manipulat[ing] unfairly so as to gain advantage." Plaintiffs cite no evidence of such manipulation.

Plaintiffs also rely on *Thomas v. Petersen*, 753 F.2d 754 (9th Cir. 1985), a case not discussed in merits briefing. In *Thomas*, the Ninth Circuit concluded the Forest Service should have prepared an EIS analyzing the "combined environmental impacts of [a planned] road and [certain] timber sales that the road [was] designed to facilitate." *Id*. at 755. The interdependence of the road and planned harvest was obvious – indeed, the road had no utility apart from the

harvest. As the Ninth Circuit explained, the NEPA analysis must cover subsequent stages of a project when "[t]he dependency is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken." *Thomas*, 753 F.2d at 759 (quoting *Trout Unlimited v. Morton*, 509 F.2d 1276, 1285 (9th Cir. 1974)). The court concluded that the "dependency of the road on the timber sales," *id*., met this irrational-or-unwise standard.[1] The record does not support a comparable conclusion here, because there is independent utility in mining each of the various tracts that comprise the present-day Spring Creek Mine.

Ultimately, Plaintiffs' segmentation argument is flawed because it presumes that some sort of a master plan was in place at the Spring Creek Mine from the outset of operations, but they cite no record evidence in support. Building on this unfounded presumption, Plaintiffs reason that an EIS should have been prepared and argue this shortcoming should be corrected, now, through preparation of an EIS. This argument fails as a matter of fact and law.

[1] The court should reject Plaintiffs' further contention, ECF No. 78 at 5, that a statement regarding remedy made by a witness for Intervenor (to the effect that mining operations at the Spring Creek Mine are "interrelated") means that they are "interdependent" for purposes of NEPA segmentation analysis. Mining operations may be interrelated in certain functional respects and may be authorized by a single permit issued under the Surface Mining Control and Reclamation Act ("SMCRA"), but that does not make them "interdependent," as that term is used in the Ninth Circuit case law on segmentation.

As to fact, Plaintiffs posit only a hypothetical scenario that the mine owners planned all along that the Spring Creek Mine would assume its current geographic dimensions; that those owners had the capital, and the desire, to plan for and undertake such a massive project, rather than proceed with more manageable phases as the MLA allows; that they were confident they could recruit a sufficient workforce (including managers, technicians, and laborers) in this rural region of eastern Montana to achieve the master plan Plaintiffs evidently contemplate; and that, in order to avoid an EIS, the mine owners or Interior personnel, at the outset, segmented the modern-day dimensions of the mine into a series of "EA-sized" tracts.

Not only is this scenario unsupported by the record, it is contrary to business practice in the mineral extraction industry. Surface mining is highly regulated and, as the magistrate noted, includes many stages and numerous regulatory requirements. ECF 71 at 33. Decisions to undertake or expand mining operations must not only take these circumstances into account, but also the availability of a labor force and whether market conditions favor mineral extraction. Plaintiffs' hypothetical construct ascribes far too much foresight to the mine owners in expecting them to anticipate, at the outset, the ultimate dimensions of the mine and, based on that, to devise a scheme for EIS-avoidance.

In addition, Plaintiffs' argument fails as a matter of law for the three reasons Federal Defendants advanced in their merits reply brief. ECF No. 68 at 13-14. First, the MLA and its implementing regulations, contemplate an incremental process, as the Magistrate noted. *See* ECF 71 at 31-32; *see also* 30 U.S.C. § 203, 43 C.F.R. § 3432.2(a). Second, OSMRE has no authority to approve mining plans until operators acquire leases and apply for Montana-issued SMCRA permits, in a market-driven process. OSMRE does not control this process any more than BLM controls the leasing application process and thus cannot be responsible for piecemealing. Finally, despite Plaintiffs' contentions to the contrary, the size of a proposed mine expansion is not determinative of the question whether an EIS is required. Rather, the decision whether to prepare an EIS is governed by the significance factors in 40 C.F.R. § 1508.27 and is based on site conditions. For example, a small expansion could demand an EIS if the significance factor for endangered species were sufficiently implicated.

Because Plaintiffs fail to demonstrate error in the Magistrate's segmentation ruling, their objection should be rejected.

2. In the Event the Agency Erred, Remand without Vacatur for Corrective NEPA analysis is the Proper Remedy.

Federal Defendants do not object to the Magistrate's recommendation against vacatur during the completion of any necessary corrective NEPA analysis,

although for reasons explained in their Rule 72 Objections, ECF No. 77, they contend Plaintiffs are entitled to no remedy at all. Plaintiffs however insist that a more careful balancing of the respective harms and the public interest will show that an injunction, during the period of corrective NEPA analysis, or at least an order of vacatur, is appropriate, in the event the Court finds legal error.

An injunction is "a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). It is a matter of "equitable discretion" and "does not follow from success on the merits as a matter of course." *Internet Specialties W., Inc. v. Milon-DiGiorgio Enterprises, Inc*., 559 F.3d 985, 998 (9th Cir. 2009) (quoting *Winter v. NRDC, Inc*., 555 U.S. 7, 32 (2008); *accord Weinberger v. Romero–Barcelo*, 456 U.S. 305, 311–312 (1982) (a federal judge "sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law").

Further, if a "less drastic remedy," such as vacatur, is "sufficient to redress a [party's] injury, no recourse to the additional and extraordinary relief of an injunction [is] warranted. *Monsanto*, 561 U.S. at 165–66. However, as with injunctive relief, vacatur is not required for every violation of law. *Nat'l Wildlife Federation v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995).

In *WildEarth Guardians v. OSMRE* (*WEG*), No. CV 14-103-BLG-SPW, 2016 WL 259285 (D. Mont. Jan. 21, 2016), which involved an earlier challenge to

this same mining plan expansion, the Court found certain NEPA violations but declined to vacate the challenged decisions while OSMRE completed corrective NEPA analysis. In doing so, the Court adopted the conclusions of the Magistrate Judge, among them, her view that equity "warrant[ed] a decision to allow the [challenged action] to remain in force, provided that Federal Defendants must correct the errors in its NEPA process." *WildEarth Guardians v. OSMRE*, No. CV 14-13-BLG-SPW, 2015 WL 6442724, at *9 (D. Mont. Oct. 23, 2015).

The Magistrate relied in part on the Ninth Circuit's observation that, in determining whether an order of vacatur should issue, courts should consider "how serious the agency's errors are and the disruptive consequences of an interim change that may itself be changed." *California Communities Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 992 (9th Cir. 2012) (internal quotation omitted). The Magistrate concluded that the Secretary's decision:

> was the result of a long application process involving multiple state and federal agencies. A vacatur at this point, seven years after the initial application for the mining plan amendment was filed and three years after its approval, would have detrimental consequences for [the Spring Creek Mine] and its employees, for the State of Montana, and for other agencies involved in this process . . . . Not only production at the mine, but also reclamation and remediation efforts, would come to a halt.

WildEarth Guardians v. OSMRE, 2015 WL 6442724, at *9. This conclusion was comparable to one reached by the District of Colorado in a case challenging a mining plan approval in western Colorado. *See WildEarth Guardians v. OSM*, No.

13–cv–00518, 2015 WL 2207834 at *16 (D. Colo. May 8, 2015). The Colorado court also declined to vacate the mining plan decision. In this case, the "detrimental consequences" to the mine, its employees, the State of Montana, and the United States, in terms of lost royalties, are comparable to those which drove this Court's decision against vacatur in *WEG*. Further, the delay that was of such concern to the Magistrate has now increased from seven to eleven years. All these factors counsel maintaining the status quo while corrective NEPA analysis is completed.

CONCLUSION

For the foregoing reasons, Federal Defendants respectfully request that the Court adopt those aspects of the Magistrate's Report relating to remedy and improper segmentation; decline to adopt those aspects objected to in Federal Defendants' Rule 72 Objections, ECF No. 77; dismiss MEIC as a party due to lack of standing; and enter judgment in favor of all Defendants.

Respectfully submitted this 22nd day of April, 2019,

JEAN E. WILLIAMS
Deputy Assistant Attorney General
U.S. Department of Justice
Environment and Natural Resources Division

/s/ John S. Most
JOHN S. MOST, Trial Attorney
Natural Resources Section
P.O. Box 7611, Washington, D.C. 20044

202-616-3353 || 202-305-0506 (fax)
John.Most@usdoj.gov

Counsel for Federal Defendants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing is being filed with the Clerk of the Court using the Court's CM/ECF system, thereby serving it on all parties of record on April 22, 2019.

/s/ *John S. Most*
JOHN S. MOST
Counsel for Federal Defendant